IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. . . . . .

LEON S. DURE, TRUSTEE OF THE GEORGIA, FLORIDA & ALABAMA RAILROAD COMPANY, AND THE GEORGIA, FLORIDA & ALABAMA RAILROAD COMPANY, DEBTOR, *Petitioner*,

v.

OTIS A. GLAZEBROOK, JR., JOSEPH FRANCE AND S. RALPH WARNKEN, CONSTITUTING THE REORGANIZATION COMMITTEE OF THE SEABOARD AIR LINE RAILWAY COMPANY, AND LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS, *Respondents*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PRELIMINARY STATEMENT

We refer to the foregoing Petition for a citation of the opinion below, a statement of the grounds of jurisdiction, and a statement of the case and the reasons given by petitioners for the granting of the Writ.

ARGUMENT

We do not see the necessity for a detailed argument in support of this petition.

We prepared a typewritten brief for the hearing in the District Court and filed it with Judge Chestnut. We cited ample authority upon the issues involved to sustain the allegations of the answer of the GF&A. Judge Chestnut in his opinion

charges the petitioners with considerable change of position in the course of the hearing. We have always held to the original position taken in our answer as follows:

> "The fiduciary relation existing between the Seaboard Receivers and the GF&A forbade them from taking advantage of their position of trust to benefit the Seaboard receivership estate to the injury and damage of the GF&A and its Receiver."

There seems to be no denial of the soundness of the authorities which we cited to the two lower courts in our briefs. It is in the application of the law to the facts upon which opposing counsel differ. Before Judge Chestnut and the Circuit Court of Appeals we quoted at length from this Court's recent opinion in the case of *Young* v. *Higbee Co.*, 65 S. Ct. U. S. 594, 89 L. ed. 578 where this Court declared the existence of a constructive trust (denied by both the District Court and the Circuit Court of Appeals in that case) in favor of all the preferred stockholders of the Higbee Company in funds secured by two stockholders from the sale of their stock *and their appeal to the Circuit Court of Appeals for the Sixth Circuit from an Order of the United States District Court for the Western District of Ohio,* confirming a plan of reorganization of the Higbee Company in bankruptcy. We think the facts of this case as to the existence of a constructive trust or fiduciary relationship are much stronger than those in that case.

If a writ of certiorari is not granted by this Court and a trust declared in favor of the GF&A and its stockholders, the great Seaboard System will be permitted to take over one of its much smaller associate lines and pay for it with the victim's own funds. We quote the following extract from our Reply Brief before the Circuit Court of Appeals:

> "A reorganization is practically impossible if the Reorganization Committee, with the aid of the Seaboard Receivers, are permitted to file claim for the full amount of the bonds, plus accrued interest.
>
> The last accounting statement from the Finance and

Accounting Department of the Seaboard Receivers shows that the net revenues of the G.F.&A. for the first six months of 1945 was $206,411. As of this time, using the first six months as a basis, the net amount due the G.F. &A. would be $1,873,862. The amount advanced by the Seaboard Receivers for the purchase of 90% of the G.F.&A. bonds was $1,180,500. Interest on this amount at 5% for two years is approximately $118,000. This would make $1,298,500 invested by the Seaboard interests in the bonds. If this amount was deducted from the credit balance of $1,873,862, it would leave the G. F. & A. $575,362. The appellants have assurances that the outstanding bonds, amounting to 10% of the whole issue, could be retired at the same figure given the Seaboard Receivers, to wit, $750 per bond, which would amount to approximately $130,000. Deducting this amount from the figure of $575,362, would leave $445,362. We could guarantee that the preferred stockholders would waive their claims for accrued dividends amounting to considerably over a million dollars, thus leaving the corporation without any outstanding debt at all. On this basis an almost perfect Reorganization Plan could be worked out, benefiting all stockholders, even the common stockholders.

This would be the result of the application of the equitable principles which we invoke in this case. On the contrary, if the Receivers of the Seaboard and the Reorganization Committee sustain their views, and are permitted to hold on to the bonds purchased by them without restraint, the total debt due on the bonds would be right at $4,000,000. In addition to preferred stock liabilities of $1,500,000, accrued interest on preferred stock dividends amounts to approximately $1,100,000. This huge indebtedness would preclude any Reorganization Plan, thus throwing the G. F. & A. back into the foreclosure proceedings in the U. S. District Court for the Middle District of Georgia. Equipped with a huge claim of nearly $4,000,000, they could 'then foreclose at some upset price

> —for as we all know nobody could bid against them—and then just take it over.' (Judge Lovett's words page 30 of Brief). Included in this sale would be the asset of $1,873,862. Having expended only $1,180,500 for the bonds, a neat profit of $693,362 and a railroad line of 133.6 miles would thus be the gain of the S. A. L. Receivers and Reorganization Committee, *and all paid for by the money due the corporation they were charged with protecting.*"

This would be the results of rejecting the principles of equity advocated by us, and substituting therefor the financial plans and aspirations of the reorganized Seaboard System.

In conclusion we repeat the words of Judge Lovett, 'That is not the equitable thing."

One of the main decisions we relied upon before the Circuit Court of Appeals was that of *Trice* v. *Comstock*, 121 Fed. 620 Judge Sanborn's opinion, concurred in by all the members of the Court, is a classic upon the question involved. He said:

> "Whenever one person is placed in such a relation to another by the act or consent of that other, or by the act of a third person, *or of the law*, that he *becomes interested for him or interested with him, in any subject of property or business, he is in such a* FIDUCIARY *relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.* * * *
>
> The existence of the relation, and a subsequent abuse of the confidence bestowed under it for the purpose of acquiring the property, are alone sufficient to authorize the enforcement of the trust." (Italics ours).

NET EARNINGS OF G. F. & A. WERE DUE

Judge Chestnut's opinion, adopted by the Circuit Court of Appeals, devotes much space to the proposition that the net earnings of the GF&A were not due. His ruling that there was no earnings due is at variance with the decisions of this

Court in the cases of *United States* v. *The State Bank of North Carolina*, 6 Peters 29; *Ward* v. *Joslin*, 186 U. S. 143. These cases held that the word "due" simply means a "state of indebtedness" and is equivalent to "owe or owing."

Judge Chestnut contradicts himself quite conspicuously in his contention along this line. He contends that the amount was only a tentative balance, "subject to deductions for subsequent deficits" in the maintenance of the physical property of the GF&A, and hence that this cost might go as high as $1,300,000 (F. 39). Just a little further in his opinion he says:

> "It is, of course, not proposed by the Seaboard Receivers to incur extensive costs of betterments in the immediate future while the Georgia Court has under consideration the petition for giving notice of termination." (F. 42)

NOT AN ISSUE BETWEEN SEABOARD CREDITORS AND G.F.&A. AND ITS STOCKHOLDERS

The record reveals that at the last hearing and in his opinion Judge Chestnut had much to say about Messrs. Simpson and Borer, the owners of the first preferred stock of the G.F.&A. The record likewise shows that Mr. Fred L. Fuller, of Cleveland, Ohio, the original owner of 2500 shares of the second preferred stock, was permitted to intervene as a party in the hearing on June 18, 1945. He took the witness stand and expressly asked the Court to protect his interest. The other block of 2500 shares of preferred stock is held by some interests in New York, who have taken no stand one way or the other. Messrs. Simpson and Borer stood in the shoes of the original stockholders. The amount they paid for the stock has nothing in the world to do with this matter. This Court held in the case of *Young* v. *Higbee*, supra, that the motives of Mr. Young in bringing the action were entirely immaterial if it was brought in the interest of all the stockholders and for their protection. In this case the action is for the benefit of all stockholders, even the holders of the common stock, the Seaboard Air Line Railway Company, or whoever was the

purchaser of the Seaboard properties in the recent sales under order of the Court.

IMPOUNDING ORDERS NO DEFENSE TO BREACH OF FIDUCIARY RELATION

The Court also lays considerable stress upon the fact that any funds due the GF&A had been impounded for the mortgage trustee. It seems to us that this contention completely overlooks the fact that we are in an equity court, dealing with the great principles of equity. Equity looks to the substance and not to the form. All of these issues, such as the effect of impounding orders and the merits and demerits of the claims of the Seaboard creditors and the GF&A stockholders, become academic if a trust relationship existed. The asset or net earnings due the GF&A, amounting at the time of the last hearing in the District Court, was $1,667,000. According to a fair estimate it amounted on January 1, 1946, to approximately $1,873,862 and may be as much as $2,000,000 now. If a trust or fiduciary relationship existed between the Seaboard Receivers and the GF&A, this relationship should not be wiped out by an order of the Court or by acts of the Reorganization Committee. It is the duty of an equity court immediately upon the ascertainment of the existence of a trust or fiduciary relationship to stop the inquiry right there. It was the duty of the District Court to have done so in this case and a court of equity could have fairly adjusted the rights of the parties with reference to all the other minor matters above mentioned.

AUTHORITIES CITED

In the lower Court we cited the following decisions and authorities for our position with reference to the duty of one in a trust or fiduciary capacity and that it is the duty of a Court in which a matter of this character is being tried to declare a constructive trust where it appears that the law in this respect has been violated.

Angel vs. *Chicago, etc. Ry Co.* 151 U. S. 1; Am. Juris.

Vol. 2, p. 202; *Bolin* vs. *Bowen*, 118 Fed. 2nd., 59; *Buffum* vs. *Barcelous Co.* 289 U. S. 227, C. J. Vol. 53, 99 C. J. S. Vol. 30, 278 C. J. S. Vol. 2, p. 6-15; *Cragin* vs. *Powell*, 122 U. S. 692 C. J. Vol. 65, 222 C. J. Vol. 65, 652;*Ford et al* vs. *Buffalo Eagle Colliery*, 122, Fed. 2nd. 555; *Felix* vs. *Patrick*, 145 U. S. 317; *Holt* vs. *Henley*, 232 U. S. 637; *Institutional Investors* vs. *C. M. St. P. & P. Ry Co.* 318 U. S. 533; *Knight Newspapers* vs. *Commission of Internal Revenue*, 143 Fed. 2nd. 1011; *Meinhard* vs. *Salmon, et al*, 249 N. Y.; *Massie* vs. *Watts* 6 Cranch 148; *Ringo* vs. *Binns*, 10 Peters 269; *Sims* vs. *Edenborn*, 198 U. S. 131; *Sterns Co.* vs. *United States* 291 U. S. 54; *United States* vs. *Bank of N. C.* 6 Peters, 29; *Wendt* vs. *Fischer*, 243 N. Y. 439, 154 N. E. 303; *Ward* vs. *Joslin*, 186 U. S. 143; *White* vs. *Ewing*, 159 U. S. 36; *Wadsworth* vs. *Adams;* 138 U. S. 380;*Young* vs. *Higbee Co.*, 89 L. ed. P. 578; *Commissioner of Internal Revenue* vs. *Owens*, 78, Fed. 2nd, p. 768; *Continental Casualty Co.*, vs. *Powell et al*, 83 Fed. 2nd. p. 652, C. J. S. vol. 36, p. 740; *Finefrock* vs. *Kenova Mine Car. Co.*, 22 Fed. 2nd. page 627; *Godfrey* vs. *Powell* 150 Fed. 2nd. p. 482; *Iroquois Iron Co.*, vs. *Kruse*, 241 Fed. 433; *Trice* vs. *Comstock*, 121 Fed. 620.

CONCLUSION

In conclusion we contend that our case was brought squarely under the definition of a fiduciary in the case of *Trice* vs. *Comstock*, Supra, which was fully approved by the lower Court in one of its own decisions. The lower Court based its decisions largely upon the fact that a trust relationship could not exist in this case because the Seaboard Receivers had been forced by law to operate the G. F. & A. lines. The definition quoted above says that a fiduciary relation may be created by the act of "the law." In this case the trust relationship was even more sacred and binding because it was ordered by the Courts upon the petition and consent of the Seaboard Receivers who were given complete protection against any operation losses and in addition the right to come into the Courts upon notice and secure the consent of the Court to the cancel-

lation of the operating orders. They were charged to make an honest accounting with the little Georgia railroad corporation for the net earnings in their hands.

If this was not a trust or fiduciary relationship we do not know how one could be brought about.

We do not think the respondents should be allowed to take refuge behind the Reorganization Committee of the Seaboard Air Line Railway Company. This committee did not purchase the bonds on the open market with their own funds but purchased them with the aid of the Court out of Receivership funds which unquestionably had been materially built up by the net earnings of the GF&A. It has been asserted repeatedly that for the last two or three years the Receivers had been operating the Seaboard System Lines for the benefit of the Seaboard lien creditors. If this be true then the Receivers were acting for the Reorganization Committee and the new Seaboard reorganization, and the Reorganization Committee is absolutely tied to the Receivers and the Receivers and the District Court are equally bound to the Reorganization Committee.

For these reasons we earnestly contend that this Court should issue the Writ of Certiorari and hear the question upon its merits.

Respectfully submitted,

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